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Deborah L. Rhode

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LITIGATING DISCRIMINATION: LESSONS FROM THE FRONT LINES

*Deborah L. Rhode**

I got to know Clare Dalton in 1985, the year that the Harvard Law School faculty failed to grant her tenure. I was visiting at Harvard, and this was my first exposure to a sex discrimination claim at close range. It was a profoundly unsettling experience. What did it say about the future for feminists in legal education if this could happen to someone as talented and deserving as Clare at a place like Harvard?

If there was anything redeeming about the experience, it was the opportunity to see someone survive a discrimination case with her dignity, commitments, and reputation intact. This essay seeks to account for that rare experience. What was typical about the challenges that her litigation posed, and distinctive about the way that she addressed them? Her case, together with similar discrimination claims, holds broader lessons about the capacities and constraints of law in pursuit of social justice.

I. EVIDENTIARY HURDLES IN EMPLOYMENT DISCRIMINATION CASES

Employment discrimination cases are, as research demonstrates, “exceedingly difficult to win.”¹ They are also

* Ernest W. McFarland Professor of Law, Director of the Center on the Legal Profession, Stanford University. The research assistance of Laurel Schroeder and the comments of Clare Dalton are gratefully acknowledged.

¹ Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE L. REV. 111, 115 (2007) (citing studies); accord Kevin M. Clermont & Stewart Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse*, 3 HARV. L. & POL’Y REV. 103, 103, 113 (2009) [hereinafter *Employment*

difficult to settle on terms that adequately compensate for the costs of complaining. Fewer than a fifth of sex and race discrimination claims filed with the federal Equal Opportunity Commission result in outcomes favorable to the complainant.² Settlements in these cases are generally modest, and only two percent of complaints result in victory at trial.³ About forty percent of trial wins are only temporary; they are reversed on appeal.⁴ Lawsuits of the kind Clare Dalton brought, alleging discrimination against lawyers or law professors, almost never produce a final judgment for the complainant.⁵

Plaintiffs in upper-level employment positions face multiple obstacles. Part of the problem is the mismatch between legal

Discrimination Plaintiffs] (noting that compared to other plaintiffs, employment discrimination complainants manage fewer early resolutions and win a lower proportion of trials and appeals); Laura Beth Nielsen, Robert L. Nelson & Ryan Lancaster, *Individual Justice or Collective Legal Mobilization: Employment Discrimination Litigation in the Post-Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 187, 195–96 (2010) (noting that only about two percent of plaintiffs win in court); Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 561–69 (2001) (exploring reasons for the low success rate of employment discrimination plaintiffs). See generally Kevin M. Clermont & Stewart Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Courts*, 1 J. EMPIRICAL LEGAL STUD. 429 (2004) (finding low success rates for employment discrimination plaintiffs in federal court).

² *Race-Based Charges, F.Y. 1997-2011*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://eeoc.gov/eeoc/statistics/enforcement/race.cfm> (last visited Feb. 2, 2012); *Sex-Based Charges, F.Y. 1997-2011*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/eeoc/statistics/enforcement/sex.cfm> (last visited Feb. 2, 2012).

³ Kotkin, *supra* note 1, at 144 (noting mean recovery of \$54,651); Nielsen, Nelson & Lancaster, *supra* note 1, at 187.

⁴ Clermont & Schwab, *Employment Discrimination Plaintiffs*, *supra* note 1, at 111.

⁵ See Eyana J. Smith, *Employment Discrimination in the Firm: Does the Legal System Provide Remedies for Women and Minority Members of the Bar?*, 6 U. PA. J. LAB. & EMP. L. 789, 789, 799–803 (2007). For a discussion of these difficulties, see Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041, 1065–68 (2011); and David B. Wilkins, *On Being Good and Black*, 112 HARV. L. REV. 1924 (1999) (reviewing PAUL M. BARRETT, *THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA* (1999)).

definitions of discrimination and the social patterns that produce it. The most common way for professionals to establish a claim is to prove that they were treated differently on the basis of a prohibited characteristic, such as race, ethnicity, or sex.⁶ If an employer offers a non-discriminatory reason for the treatment, the plaintiff bears the burden of proving that it is an obvious pretext. In cases involving mixed motives, if an employer can establish that non-discriminatory reasons would have produced the same outcome, then a plaintiff can only recover injunctive relief and attorney's fees.⁷ In effect, the law forces a choice between two overly simplistic accounts of workplace decision making. The basis for an employer's decision must be judged either biased, or unbiased; its justifications sincere, or fabricated. Yet in life rather than law, legitimate concerns and group prejudices are often intertwined, and bias operates at unconscious levels throughout the evaluation process rather than simply at conscious levels at the time a decision is made.⁸ Most of what produces different outcomes in upper-level employment contexts is not a function of demonstrably discriminatory treatment. Rather, these outcomes reflect interactions shaped by unconscious assumptions and organizational practices that "cannot be traced to the sexism [or racism of an identifiable] bad actor."⁹

So, too, the subjectivity of standards and lack of transparency in upper-level employment decisions generally makes it difficult for individuals to know or to prove that they have been subject to bias. Unless and until they assume the costs

⁶ Title VII of the federal Civil Rights Act prohibits discrimination based on race, color, religion, sex, or national origin. 42 U.S.C. § 2000e (2006). For an overview, see KATHARINE T. BARTLETT & DEBORAH L. RHODE, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* 89 (2010).

⁷ Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.); BARTLETT & RHODE, *supra* note 6.

⁸ DEBORAH L. RHODE, *SPEAKING OF SEX* 160 (1997); Linda Hamilton Kreiger, *The Content of Our Categories*, 47 STAN. L. REV. 1161, 1164 (1995).

⁹ Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 471 (2001).

of suing, they may have little idea of whether they have a suit worth bringing. Not all differential treatment leaves a paper trail, and colleagues with corroborating evidence are often reluctant to expose it for fear of jeopardizing their own positions.¹⁰ Plaintiffs like Dalton who are denied promotion seldom know until after discovery how closely their files resemble those of successful candidates.

Ann Hopkins, an accountant who successfully sued Price Waterhouse, had no specific proof that sexist comments had been made about her or any other woman at the firm at the time she filed her complaint.¹¹ Although she had received advice that she should “walk more femininely, talk more femininely, dress more femininely, wear makeup and jewelry, [and have her] hair styled,” she had viewed these suggestions as “nonsense” rather than evidence of bias.¹² In fact, the record ultimately revealed ample evidence of sexist stereotyping. Female accountants were faulted for being “curt,” “brusque,” or “women’s libber[s],” or for acting like “one of the boys.”¹³ Hopkins herself was characterized as someone who “overcompensated for being a woman” by acting “macho” and “overbearing” and needed “a course at charm school.”¹⁴ Yet several male accountants who achieved partnership had been similarly described—as “abrasive,” “overbearing,” and “cocky.”¹⁵ No one suggested charm school for them.

¹⁰ Deborah L. Rhode & Joan Williams, *Legal Perspectives on Employment Discrimination*, in *SEX DISCRIMINATION IN THE WORKPLACE* 243 (Faye J. Crosby, Margaret S. Stockdale & S. Ann Ropp eds., 2007); *Riordan v. Kempiners*, 831 F.2d 690, 697 (7th Cir. 1987).

¹¹ *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1114 (D.D.C. 1985), *aff’d in part, rev’d in part*, 825 F.2d 458 (D.C. Cir. 1987), *aff’d in part, rev’d in part*, 490 U.S. 228 (1989), *superseded by* Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071, 1075–76 (codified in scattered sections of 42 U.S.C.); *ANN BRANIGAR HOPKINS, SO ORDERED: MAKING PARTNER THE HARD WAY* 172 (1996).

¹² *HOPKINS*, *supra* note 11, at 148; *see also* Cynthia Estlund, *The Story of Price Waterhouse v. Hopkins*, in *EMPLOYMENT DISCRIMINATION STORIES* 65, 69 (Joel Wm. Friedman ed., 2006) (quoting Ann Hopkins).

¹³ *Hopkins*, 618 F. Supp. at 1117.

¹⁴ *HOPKINS*, *supra* note 11, at 235.

¹⁵ *Hopkins*, 618 F. Supp. at 1115, 1117.

So, too, Nancy Ezold, the associate who sued the Philadelphia firm of Wolf, Block, Schorr & Solis-Cohen for discrimination after being denied a partnership, learned only after discovery how her performance evaluations stacked up against those of male colleagues who were promoted. She had been characterized as too “assertive,” too preoccupied with “women’s issues” and too lacking in analytic ability.¹⁶ Yet, some of the male associates who became partners had been described as “not real smart,” “overly confrontational,” “very lazy,” and “more sizzle than steak.”¹⁷

Even when plaintiffs can produce evidence of sex-based stereotypes and double standards, courts sometimes discount its significance. “Stray remarks” in the workplace are insufficient to establish liability if a defendant can demonstrate some legitimate reason for the unfavorable treatment.¹⁸ In one unsuccessful tenure case decided the same year as Dalton’s denial, a female professor introduced comments describing herself as too feminine: “unassuming, unaggressive, unassertive, and not highly motivated for vigorous interpersonal competition.”¹⁹ Yet both the lower and appellate courts dismissed such comments as related not to gender but simply to “the effect of her personality on graduate students”²⁰ Nancy Ezold similarly lost her case on appeal despite evidence of a double standard. The court found that comments about her reflected concern over her abilities, rather than an “obvious or manifest” pretext on the part of the firm.²¹

The outcome of Ezold’s case is similar to that in one of the nation’s only reported race discrimination trials involving a law firm promotion decision. Larry Mungin was a lateral hire to the

¹⁶ *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 751 F. Supp. 1175, 1188–89 (E.D. Pa. 1990), *rev’d*, 983 F.2d 509 (3d Cir. 1992).

¹⁷ *Ezold*, 751 F. Supp. at 1185–87.

¹⁸ *Heim v. Utah*, 8 F.3d 1541, 1546 (10th Cir. 1993); *see also Ezold*, 983 F.2d at 544–46; Deborah L. Rhode, *What’s Sex Got to Do With It?: Diversity in the Legal Profession*, in *LEGAL ETHICS: LAW STORIES* 233, 241 (Deborah L. Rhode & David J. Luban eds., 2006).

¹⁹ *Zahorik v. Cornell Univ.*, 729 F.2d 85, 89–90 (2d Cir. 1984).

²⁰ *Id.* at 94.

²¹ *Ezold*, 983 F.2d at 534; *see also Rhode*, *supra* note 18, at 243.

District of Columbia branch office of Katten Muchin & Zavis. A black graduate of Harvard College and Harvard Law School, with six years experience in bankruptcy law, Mungin fell through the cracks of the firm's mentoring and business development efforts. A two-and-a-half-million dollar jury verdict in his favor was reversed on appeal by judges who saw him as a victim not of racial bias but merely "business as usual mismanagement."²² Problems of proof are compounded in contexts like tenure evaluations, where ostensibly "objective" evaluations are obtained through a process that may be anything but objective. In a politically charged atmosphere, such as the one at Harvard Law School during the 1980s when Clare Dalton sought tenure, assessments of scholarly merit are likely to depend on who is doing the assessing.

Nancy Gertner, Dalton's lawyer, highlighted an obvious flaw in Dalton's tenure evaluation. The panel of outside reviewers that Harvard President Derek Bok appointed to consider the case consisted of no one "even conversant with Critical Legal Studies," the approach that Dalton's scholarship reflected.²³ A second problem was that the standard that President Bok asked the reviewers to apply was not the one applicable at Harvard at the time, but the one that they would use to assess the qualifications of someone at any leading law school.²⁴ Yet, as Dalton later noted, it was hardly an even playing field when the five male candidates up for tenure were "judged by an internal standard and the sole female candidate by a 'universal' standard."²⁵

Given these evidentiary hurdles, it should come as no surprise that individuals who perceive themselves as subject to employment discrimination seldom file formal complaints.²⁶

²² Wilkins, *supra* note 5, at 1927, 1933.

²³ Emily M. Bernstein, *Bok Rejects Dalton Tenure Appeal*, HARV. CRIMSON (Feb. 9, 2003), <http://www.thecrimson.com/article/2003/2/9/bok-rejects-dalton-tenure-appeal-ppresident> (quoting Dalton's lawyer Nancy Gertner).

²⁴ Email from Clare Dalton to author (Sept. 28, 2010) (on file with author).

²⁵ *Id.*

²⁶ See William L.F. Felstiner et al., *The Emergence and Transformation*

Their reluctance is reinforced by the personal costs of adversarial processes.

II. THE PERSONAL PRICE OF LEGAL PROCEEDINGS

The costs of a discrimination case can be substantial, both in financial and psychological terms. Ann Hopkins' legal fees for her seven-year suit against Price Waterhouse totaled over \$800,000 in today's dollars.²⁷ Even if a plaintiff finds an attorney to take the case on a contingent fee basis, the out-of-pocket litigation expenses can be steep; Nancy Ezold estimated hers at over \$150,000 in today's dollars.²⁸ Plaintiffs also put their professional lives on trial, and the profiles that emerge are seldom entirely flattering. In listening to defense witnesses, Hopkins "felt as if [her] personality were being dissected like a diseased frog in the biology lab."²⁹ In some cases, complainants' foibles become fodder for the national press. The lead plaintiff who sued Sullivan and Cromwell in one of the nation's first law firm sex discrimination cases had her "mediocre law school grades" aired in the *Wall Street Journal*.³⁰ A gay associate who sued the same firm three decades later found himself described in *New York Magazine* as a "smarmy," "paranoid kid with a persecution complex."³¹ In Ezold's case, a Wolf Block senior

of Disputes: Naming, Blaming, Claiming . . ., 15 LAW & SOC'Y REV. 631, 642 (1980-81). For a discussion of the reasons behind the lack of formal complaints, see Kristin Bumiller, *Victims in the Shadow of the Law: A Critique of the Model of Legal Protection*, 12 SIGNS 421, 424-27 (1987).

²⁷ HOPKINS, *supra* note 11, at 384 (\$500,000 in 1991 dollars). See the *Inflation Calculator*, BUREAU OF LABOR, http://www.bls.gov/data/inflation_calculator.htm (last visited Feb. 3, 2012), to make the conversion to today's dollars.

²⁸ Rhode, *supra* note 18, at 246 (\$100,000 in 1993 dollars). See the *Inflation Calculator*, BUREAU OF LABOR, http://www.bls.gov/data/inflation_calculator.htm (last visited Feb. 3, 2012), to make the conversion to today's dollars.

²⁹ HOPKINS, *supra* note 11, at 197.

³⁰ FRED STREBEIGH, *EQUAL: WOMEN RESHAPE AMERICAN LAW* 193 (2009) (discussing litigation against Sullivan and Cromwell).

³¹ Robert Kolker, *The Gay Flannel Suit*, N.Y. TIMES MAG. (Feb. 25, 2007), <http://nymag.com/news/features/28515/>.

partner told the *American Lawyer* that she was like the proverbial “ugly girl. Everybody says she has a great personality. It turns out that [Nancy] didn’t even have a great personality.”³²

Even favorable press accounts often deliver backhanded compliments that would make any potential litigant think twice. A *Boston Globe* profile of Clare Dalton noted: “She doesn’t sound like some crazed feminist spouting anti-male sexual, political or legal jargon that would allow her to be dubbed a strident female.”³³ More of the same appeared in a *New York Times* portrait of Shannon Faulkner, the woman who sued for admission to the Citadel, South Carolina’s all-male military academy. Faulkner was not a “cantankerous man hater, lesbian, or ugly duckling out to find a mate.”³⁴

Although many potential plaintiffs are drawn to litigation as a way of demonstrating their capabilities and restoring their reputations, the result is often the opposite. Complaining about bias risks making individuals seem too “aggressive,” “confrontational,” or “oversensitive”; they may be typecast as a “troublemaker,” “bitch,” or an “angry black.”³⁵ Advice from

³² Loren Feldman, *What’s Sex Got to Do With It? Partnership on Trial*, AM. LAW., Nov. 1990, at 56, available at <http://amlawdaily.typepad.com/files/partnership-on-trial---november-1990.pdf> (quoting Charles Kopp).

³³ Patti Doten, *The Law Professor Who Sued Harvard Tells Why the Deck is Stacked Against Women*, BOS. GLOBE, Oct. 25, 1993, at 36.

³⁴ Catherine S. Manegold, *The Citadel’s Lone Wolf; Shannon Faulkner*, N.Y. TIMES MAG. (Sept. 11, 1994), <http://www.nytimes.com/1994/09/11/magazine/the-citadel-s-lone-wolf-shannon-faulkner.html?pagewanted=all>.

³⁵ JANET E. GANS EPNER, ABA COMM’N ON WOMEN IN THE PROFESSION, VISIBLE INVISIBILITY: WOMEN OF COLOR IN LAW FIRMS 25 (2006) (“aggressive,” “bitch”); DEBORAH L. RHODE, ABA COMM’N ON WOMEN IN THE PROFESSION, THE UNFINISHED AGENDA: WOMEN AND THE LEGAL PROFESSION 21 (2001) (“troublemaker,” “oversensitive”); JOAN C. WILLIAMS & VETA T. RICHARDSON, THE PROJECT FOR ATTORNEY RETENTION, NEW MILLENNIUM, SAME GLASS CEILING?: THE IMPACT OF LAW FIRM COMPENSATION SYSTEMS ON WOMEN 38 (2010) (“confrontational”); Jill L. Cruz & Melinda S. Molina, *Hispanic National Bar Association National Study on the Status of Latinas in the Legal Profession, Few and Far Between: The Reality of Latina Lawyers*, 37 PEPP. L. REV. 971, 1019 (2010) (“rock the boat”); Nancy M. Reichman & Joyce S. Sterling, *Sticky Floors, Broken Steps, and Concrete Ceilings in Legal Careers*, 14 TEX. J. WOMEN & L. 27,

colleagues is generally to “let bygones be bygones,” “let it lie,” “[d]on’t make waves, just move on.”³⁶ Those who ignore that advice frequently experience informal retaliation and blacklisting; “professional suicide” is a common description.³⁷ As one plaintiff’s attorney put it, a “mid or high level attorney who decide[s] to sue in connection with a cutback or firing may never eat lunch in [this] town again.”³⁸

Reported cases bear this out. Hopkins found herself “a pariah in the Big Eight” accounting firms.³⁹ Lawrence Mungin had a similar experience. As he testified at trial, other firms “may admire me, but they won’t hire me. I am a whistleblower I am persona non grata. My career is dead. That is what I think. That is what I found. That is what I know.”⁴⁰ Darlene Jespersen, a bartender who unsuccessfully sued Harrah’s Casino for gender discrimination in its grooming code, failed to find another job. As her attorney noted, for anyone in the entertainment industry, “Reno is a small town.”⁴¹

Shannon Faulkner paid a still higher price for her challenge to the exclusion of women from the Citadel. While her suit was pending, she attended the school as a day student, and experienced constant intimidation, vilification, and isolation. She

69 (2004) (“bitch”); Marcia Coyle, *Black Lawyer’s Life, Suit Told by a White Author*, NAT’L L.J., Jan. 11, 1999, at A14 (quoting Lawrence Mungin, “angry black”).

³⁶ For the advice, see Kolker, *supra* note 31; and EPNER, *supra* note 35, at 21. For negative consequences following complaints about compensation, see WILLIAMS & RICHARDSON, *supra* note 35, at 38.

³⁷ RHODE, *supra* note 8, at 162. The problem is true of employment discrimination litigation generally. See Linda Hamilton Krieger, *The Watched Variable Improves: On Eliminating Sex Discrimination in Employment*, in SEX DISCRIMINATION IN THE WORKPLACE, *supra* note 10, at 296, 309–10; Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663.

³⁸ PAUL M. BARRETT, *THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA* 59 (1998) (quoting George Galland).

³⁹ HOPKINS, *supra* note 11, at 166.

⁴⁰ BARRETT, *supra* note 38, at 154.

⁴¹ DEBORAH L. RHODE, *THE BEAUTY BIAS: THE INJUSTICE OF APPEARANCE IN LIFE AND LAW* 14 (2010) (quoting Jennifer Pizer).

was not permitted to sleep in the barracks, eat in the mess hall, work on the newspaper, or play in the marching band.⁴² She received multiple death threats, her family's house was vandalized, and her sex life was the subject of frequent speculation in school publications.⁴³ "Die Shannon" greeted her from a Charleston billboard; "Go Home" and "Save the Males" appeared on campus signs and banners.⁴⁴

III. WINNERS AND LOSERS

So what might make litigating discrimination claims worth these risks? What constitutes winning and what might predict it? Empirical research on employment discrimination generally uses money as the metric of a "favorable" outcome. But qualitative studies of dispute resolution techniques make clear the need for more sophisticated measures of success.⁴⁵ Complainants' satisfaction is not always determined by monetary compensation. Nor are their interests the only concern in assessing the societal contributions of legal proceedings.

Although we lack systematic data on broader measures of winning and losing in the discrimination context, the case studies that are available suggest two key questions to consider. To

⁴² Manegold, *supra* note 34.

⁴³ CATHERINE S. MANEGOLD, IN GLORY'S SHADOW: SHANNON FAULKNER, THE CITADEL, AND A CHANGING AMERICA 21, 182 (2000); Manegold, *supra* note 34.

⁴⁴ MANEGOLD, *supra* note 43, at 21, 206.

⁴⁵ For such studies in the context of negotiated agreements, see generally Jared R. Curhan, Hillary Anger Elfenbein & Noah Eisenkraft, *The Objective Value of Subjective Value: A Multi-Round Negotiation Study*, 40 J. APPLIED SOC. PSYCHOL. 690 (2010); Jared R. Curhan, Hillary Anger Elfenbein & Heng Xu, *What Do People Value When They Negotiate? Mapping the Domain of Subjective Value in Negotiation*, 91 J. PERSONALITY & SOC. PSYCHOL. 493 (2006); Michele J. Gelfand et al., *Negotiating Relationally: The Dynamics of the Relational Self in Negotiations*, 31 ACAD. MGMT. REV. 427 (2007); and Tom R. Tyler & S.L. Blader, *Justice and Negotiation*, in THE HANDBOOK OF NEGOTIATION AND CULTURE 295 (Michele J. Gelfand & Jeanne M. Brett eds., 2004). For dispute resolution generally, see E. ALLEN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (1988).

what extent did the plaintiffs get what they wanted? And were they able to use the experience to improve their lives, their institutions, or the opportunities for other potential victims of discrimination? Although many factors that affect a judgment are beyond the control of complainants, and indeed may have little to do with the objective “merits” of a claim, litigants have more influence over the meaning of the experience than they often realize.⁴⁶

Individuals bring discrimination cases for multiple reasons, but most plaintiffs share one overriding interest: the desire for vindication. Complainants generally see themselves as victims of injustice for which the law should provide some remedy. Clare Dalton reported a sense of anger; she believed her work was “tenure-worthy” and that the process had been tainted by political and gender bias.⁴⁷ Nancy Ezold similarly felt that she had been “as good or better as many of the men the firm promoted.”⁴⁸ Ezold also believed that other women at the firm were subject to the same injustice and she wanted to do something to “improve their situation.”⁴⁹ Lawrence Mungin felt

doubly burned at Katten Muchen. He had defined himself largely in terms of professional success. The law firm crushed that self image by making him feel like a failure. Worse, he had walked away feeling foolish that for his whole life, he had “gone the extra mile to show people . . . that I wasn’t one of those blacks, one of the dangerous ones, the bad ones. Or one of the complainers, the ones demanding special treatment I wanted to

⁴⁶ For example, the rating that EEOC experts give to a claim does not predict outcome. More important factors include whether the party has legal representation and whether the claim is part of a class action. Nielsen, Nelson & Lancaster, *supra* note 1, at 191–92. Other obvious factors that affect trial outcomes include the abilities of counsel, the resources of the parties, and the sympathies of judges and jurors.

⁴⁷ Bernstein, *supra* note 23 (quoting Dalton on tenure-worthy work); Alice Dembner, *MCAD Leans on Harvard in Gender Bias Case*, BOS. GLOBE, July 28, 1993, at M13 (quoting Dalton on bias); Doten, *supra* note 33 (quoting Dalton on anger).

⁴⁸ Rhode, *supra* note 18, at 242 (quoting Ezold).

⁴⁹ *Id.*

show that I was like white people . . . one of the good blacks.” But that hadn’t been enough.⁵⁰

Shannon Faulkner was also driven by anger after the Citadel rescinded her admission upon learning that she was female. Her brother was then thriving as a naval recruit. It seemed unjust to deny her similar chances for a military career.⁵¹ Although she had not been sure that she wanted to attend the school, and later, she struggled with the decision whether to file a lawsuit, once the Citadel made clear its intention to fight her access, Faulkner’s resolve stiffened and she felt she could not “back out[,]”: “This [was] what I’ve been working for.”⁵²

Money, of course, often plays a role in a plaintiff’s decision to sue. For Hopkins it was the driving force. In describing her reaction when Price Waterhouse denied her partnership, she recalled: “For the first time since I graduated from college, I was unemployed and scared to death at the prospect of running out of money.”⁵³ Lawrence Mungin was also anxious for a recovery that would make up some of the difference between his law firm salary and his income from temporary contract work.

For most of these plaintiffs, as with employment discrimination complainants generally, legal outcomes fell far short of their original goals, and it is difficult to identify factors that might have guaranteed better results. The most systematic research to date finds that the factors most correlated with favorable monetary awards are having a lawyer, and being part of a class action or other collective mobilization effort.⁵⁴ Notably, the merits of a claim, even when assessed by disinterested Equal Employment Opportunity Commission (“EEOC”) experts, are not accurate predictors of financial success.⁵⁵

Nor is winning in that sense an accurate gauge of the broader personal and social impact of litigation. Of the cases discussed here, only Hopkins got full compensation for her

⁵⁰ BARRETT, *supra* note 38, at 5–6 (quoting Mungin).

⁵¹ Manegold, *supra* note 34.

⁵² *Id.* (quoting Faulkner); see MANEGOLD, *supra* note 43, at 160.

⁵³ HOPKINS, *supra* note 11, at 165.

⁵⁴ Nielsen, Nelson & Lancaster, *supra* note 1, at 192.

⁵⁵ See *id.*

financial losses. But oddly enough, the experience seemed to do little to equip or inspire her to advance gender equity outside the context of her own case. For Hopkins, the personal was simply personal, not political. Her autobiography recounts no efforts to level the playing field at Price Waterhouse once she was reinstated. Nor does it suggest a full appreciation of the sexual stereotypes that her lawsuit was challenging. With no sense of irony, she recounts friends' characterizations of opposing counsel at the Supreme Court argument. The lawyer was "dowdy"; she wore an "awful black suit and no jewelry," and could have benefited from makeup.⁵⁶ This from a woman whose discrimination case was built on similar criticisms of her own cosmetic deficits.

By contrast, Nancy Ezold was a loser financially. Not only did she fail to recover her losses in compensation and career opportunities, she also had to pay her opponents' appellate expenses as well as her own out of pocket costs.⁵⁷ But she turned the outcome into something "positive" by using it to launch a new career.⁵⁸ The publicity that the case generated put her in touch with women who had similar stories, and she developed a profitable practice in sex discrimination litigation.⁵⁹ The litigation also served as a "wake up call" to the profession in general, and Wolf Block in particular. At the time Ezold sued, only one of the firm's fifty-five litigation partners was female.⁶⁰ That quickly changed, although some of the women who benefited from the firm's efforts to refurbish its reputation paid a price in credibility: the label "Ezold partner" was hard to shake.⁶¹ Yet in assessing that legacy, the question is always "compared to what?" No one wants to be perceived as getting a job solely because she is a woman, but it is still better than not getting a job for that reason.⁶²

⁵⁶ HOPKINS, *supra* note 11, at 294; *see also* Estlund, *supra* note 12, at 82 (commenting on the irony of these characterizations).

⁵⁷ *See* Rhode, *supra* note 18, at 253.

⁵⁸ *Id.* (quoting Ezold).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *See* RHODE, *supra* note 8, at 169 (quoting Barbara Babcock).

Lawrence Mungin's story also had mixed results. Financially, there was no happy ending. And although he "never wanted publicity," Mungin got plenty.⁶³ In the book that his Harvard roommate, Paul Barrett, wrote about the case, Mungin seemed to have lost in a deeper sense as well. He had spent much of his career attempting to be seen as "not merely, not primarily, black."⁶⁴ He had resisted being involved with racial issues at the firm or mentoring other lawyers of color because he "didn't want to be typecast as an African-American big brother"⁶⁵ Yet "by suing his employer, Mungin . . . ensured that everyone would see him primarily in terms of race."⁶⁶ Mungin himself, however, viewed the experience in a more positive light. "I feel I have won," he told a *National Law Journal* reporter after the book came out.⁶⁷ Although still "very, very angry" with Barrett for his "violation of trust," Mungin felt that the book accomplished something by "hit[ting] [Katten Muchen] where it hurts."⁶⁸ The publication also forced him to "see the world as it really is," and to face up to his own "worst fears" about how much race mattered.⁶⁹ Yet, when asked whether he hoped for a "broader victory" from his lawsuit, "one that could help other minorities as they follow similar career paths," Mungin responded, "I never felt I had to carry that burden."⁷⁰ Apparently, nothing about the litigation experience increased his willingness to assume that responsibility.

Shannon Faulkner also got a discomfoting look at the "world as it really is," and the limits of law in addressing it. Her victory in the Supreme Court did not bring victory in the world outside it. The Justices could command her admission but not her acceptance at the Citadel. After five days of life as a full-time cadet with federal marshal protection, physical and

⁶³ Coyle, *supra* note 35, at A14 (quoting Mungin).

⁶⁴ BARRETT, *supra* note 38, at 282.

⁶⁵ *Id.* at 43.

⁶⁶ *Id.* at 283.

⁶⁷ Coyle, *supra* note 35, at A15 (quoting Mungin).

⁶⁸ *Id.*

⁶⁹ *Id.* at A14–15.

⁷⁰ *Id.* at A15.

psychological stress forced her withdrawal. Despite the humiliation of a nationally televised exit, surrounded by jeering jubilant cadets, Faulkner expressed no regrets. As she told reporters later, she had opened the door for other women who are at the Citadel now and “that’s my prize [T]hey have that choice.”⁷¹ Ironically enough, Faulkner’s unsuccessful but well-publicized efforts to withstand harassment may have done more to advance the cause of gender equity than her graduation would have accomplished. By exposing virulent sexism to public view, her case galvanized forces for change, both within and outside the military.⁷² *The Louts of Discipline*, a *Time* story on Faulkner’s departure, chronicled her abusive treatment and made clear that while she may not have needed the Citadel, “the Citadel surely need[ed] her” or others like her.⁷³ On the fifteenth anniversary of Faulkner’s Citadel challenge, an ABC news segment summed it up: “in losing her own battle, she won the war for so many others.”⁷⁴

The outcome of Clare Dalton’s suit against Harvard Law School was similar to that of most discrimination plaintiffs in that it ended short of total victory. But what makes her story uniquely inspiring is the way that she turned difficult circumstances to the service of broader goals. From the outset, the deck was stacked against winning, either by conventional definitions or even by her own standards. What she wanted most, she told reporters at the time, was “an apology.”⁷⁵ And that, she and her lawyer came to realize, she would never get. Even if she had won a judgment from the Massachusetts Commission Against Discrimination, and even if that judgment was affirmed in court, Harvard would never acknowledge that

⁷¹ Juju Chang et al., *Life After the Citadel: Shannon Faulkner Reflects on Her Historic Battle with the Elite Military College*, ABC NEWS (Dec. 8, 2009), <http://abcnews.go.com/GMA/shannon-faulkner-reflects-citadel/story?id=9272864> (quoting Faulkner).

⁷² See MANEGOLD, *supra* note 43, at 289.

⁷³ Margaret Carlson, *The Louts of Discipline*, TIME, Aug. 28, 1995, at 35.

⁷⁴ *Good Morning America*, *Shannon Faulkner’s Life After Citadel* (ABC television broadcast Dec. 8, 2009), available at <http://abcnews.go.com/GMA/video/shannon-faulkners-life-citadel-9278236>.

⁷⁵ Doten, *supra* note 33 (quoting Dalton).

its processes had been anything but meritocratic. As the university's (female) lawyer stated on the eve of the Commission hearing: "Our position is that she was treated fairly There was no discrimination on the basis of gender or any other grounds."⁷⁶

What, then, was the best that could have come from a prolonged legal battle? Although Dalton might have obtained a significant monetary judgment, that would not have changed the quality of her life. She was not in financial need. She held another position with adequate pay, as did her husband. She might have been reinstated at Harvard, but what would her experience there have been like if she obtained the position by humiliating colleagues in courtroom proceedings? The institution was already known as the "Beirut of legal education."⁷⁷ A highly publicized discrimination suit, destined to drag on for years, might simply have made matters worse, and delayed Dalton's efforts to do something more productive with her talents and commitments.

To her enormous credit, she identified an alternative resolution that Harvard could accept. The University agreed to contribute a quarter of a million dollars to create a joint Northeastern-Harvard Institute on Domestic Violence that Dalton would direct.⁷⁸ In commenting on the settlement, she stated,

It is fitting that if Harvard [is] going to pay a price for gender discrimination, it should . . . help women who are the most egregious victims In addition, this gives me the professional opportunities that mean the most to me at this time in my career.⁷⁹

Harvard's attorney applauded the agreement, not only because it ended a divisive and expensive battle, but also because it did so "in a way that everyone feels is going to do something good for

⁷⁶ Dembner, *supra* note 47, at M13 (quoting Harvard attorney Ann Taylor).

⁷⁷ *Id.* (quoting the *National Law Journal's* description of Harvard Law School's reputation).

⁷⁸ Alice Dembner, *Harvard Law Ends Bias Suit by Agreeing on Institute*, BOS. GLOBE, Sept. 22, 1993, at M1.

⁷⁹ *Id.* (quoting Dalton).

the community Clare [deserves] a lot of credit for coming up with the idea and being willing to accept it.”⁸⁰

Not only did Dalton accept the settlement, she embraced it in ways that left no one feeling that this was some second-best outcome. “I belong at Northeastern in ways I never did at Harvard,” she told the press.⁸¹ “I don’t want to sound Pollyanna-ish, but . . . I like myself better than the person I would have been at Harvard. I’ve learned so much about how our culture works, the pervasiveness of discrimination, and what it takes to [overcome it].”⁸² Unlike other discrimination litigants who became “accidental feminists” when their own cases demanded it, Dalton was a committed advocate for women before her litigation and an even stronger one in its wake.⁸³ At a panel sponsored by the Society for Alternative Law Teaching, Dalton concluded her remarks with her own definition of success:

it is important to hang on to the idea that winning isn’t everything. Waging the fight for as long as you can, knowing when to stop, and coming out of it personally intact, ready for the next venture, whatever that may be—that, it seems to me, is what it means to make a success of experience of discrimination.⁸⁴

The legacy of Dalton’s “next venture” in violence work at Northeastern speaks for itself. The example she provides for employment discrimination complainants should do so as well.

How often could other litigants accomplish what Dalton did? Clearly in some cases, no such settlement is possible. The kind of compromise that the Citadel was prepared to offer was clearly inadequate: an alternative program at another school with nothing like its own reputation and resources. But it is conceivable that some defendants in discrimination cases might

⁸⁰ *Id.* (quoting Joan A. Lukey, an attorney for Hale and Dorr, the law firm that represented Harvard in the suit).

⁸¹ *Id.* (quoting Dalton).

⁸² Doten, *supra* note 33, at 36 (quoting Dalton).

⁸³ See Juju Chang et al., *supra* note 71 (describing Shannon Faulkner).

⁸⁴ Clare Dalton, “*The Political is Personal*” in *Tenure Decisions*, HARV. L. REC., Apr. 22, 1988, at 7.

accept results that do not acknowledge wrongdoing, but that serve the community, assist complainants, and prevent embarrassing public disclosures. Wolf Block partners, for example, were opposed to settling Ezold's claim because of concerns about reputation. The firm was founded in response to anti-Semitism, and the partners "accused of discrimination . . . had spent much of their careers fighting against it."⁸⁵ Yet the Ezold litigation also took a considerable reputational toll. Public disclosures of demeaning comments about both male and female lawyers seriously damaged internal relations as well as external recruiting efforts.⁸⁶ In reflecting on the firm's decision not to settle the case, one firm leader concluded: "This may have been a case that wasn't worth winning."⁸⁷ At the very least, it was a case that might have benefited from more creative problem solving.

It may be asking a lot from both sides in discrimination cases to set aside their desires for total vindication. But as the preceding overview suggests, there are many other ways to define winning. Plaintiffs can use their legal leverage in multiple ways: to make law, to make money, to make a point, to make change, and to remake themselves. Clare Dalton's case somehow managed to do all of the above, and I am grateful for this opportunity to celebrate that unique and lasting achievement.

⁸⁵ Rhode, *supra* note 18, at 242 (quoting Arlin Adams, lawyer for Wolf Block on appeal).

⁸⁶ *Id.* at 247-48.

⁸⁷ *Id.* at 245 (quoting Robert Segal).